
FYI-310

New Mexico
Taxation and Revenue Department

FOR YOUR INFORMATION

Tax Information/Policy Office ♦ P.O. Box 630 ♦ Santa Fe, New Mexico 87504-0630

COMMUNITY PROPERTY, DIVORCE, SEPARATION AND YOUR NEW MEXICO INCOME TAX

This FYI discusses specific income tax issues arising from divorce or legal separation. It addresses how to file your return, what exemptions you may take, and how custody issues can affect your return.

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Taxpayers should be aware that subsequent legislation, regulations, court decisions, revenue rulings, notices and announcements might affect the accuracy of this publication's contents. Please contact the district tax office nearest you (see the last page of this publication) or check the department's web site at www.tax.newmexico.gov. Click on "publications".

NEW MEXICO PERSONAL INCOME TAX

Most New Mexico income tax laws are based on federal income tax laws. When filing New Mexico personal income tax returns, including those of divorced or separated taxpayers, the first step is to complete a federal return (form 1040 or 1040A and all necessary schedules). The Internal Revenue Service requires you to decide your filing status and exemptions for yourself and dependent children. A taxpayer filing a New Mexico income tax return uses the same filing status and number of exemptions for New Mexico as for the federal return (Regulation 3.3.12.12 NMAC). IRS Publication 504, *Divorced or Separated Individuals*, and IRS Publication 555, *Community Property*, are helpful to review before you fill out your return. Look for them on the IRS web site at www.irs.gov.

COMMUNITY PROPERTY

New Mexico residents, including part-year residents, should note two very important facts:

- 1. New Mexico is a community property state.**
- 2. New Mexico does not recognize common-law marriages. You must be legally married to file a joint return or to realize any division of community property upon divorce. Unless legally married, you are single, no matter how much you contribute to a relationship, its property or income, or for how long. If you are legally married in another state under the laws of that state, the legal marriage transfers to New Mexico under Section 40-1-4 NMSA 1978.**

In a community property state, all assets and liabilities you acquire during the marriage that are not separate property are community property. For a thorough definition of community property please refer to Sections 40-3-8 (B) and 40-3-8(C) NMSA 1978.

Community income is income from community property you receive during the marriage from non-business sources (e.g. wages, salaries, dividends, interest, royalties, rents, etc.) or business sources (e.g., Schedule C gross receipts or farm income) while you are residents of New Mexico.

SEPARATE PROPERTY

Separate property is real estate or personal property -- including gifts, inheritance, savings, rental income, etc. -- you acquire before the marriage, or non-business or business income you receive after the marriage is dissolved. If either you or your spouse receive a gift or an inheritance as sole-and-separate property during the marriage, that property remains sole and separate. You may also acquire property separately during a marriage when you buy it with separate funds, or you exchange separate property for other separate property. New Mexico allows you at any time during your marriage to designate separate property through a formal, written agreement between you and your spouse. For a more thorough definition of separate property, please refer to Section 40-3-8(A), NMSA 1978.

Separate income is income from separate property. It is credited to the spouse who receives the property. When a court order decrees a community property division, the date of the decree determines the end of community property and income and the beginning of separate property and income. *Do not mix funds from separate property in such a way that the funds are indistinguishable.* If you do, the funds may become community property. This is true whether a divorce is pending or not.

There are rules and exceptions too complicated to list in a general publication on separate and community property. If you believe that certain assets and liabilities are sole and separate, please consult an accountant or attorney well acquainted with community property law. You may also review IRS Publication 555, *Community Property*, before you fill out your return.

FEDERAL AND STATE FILING STATUS

If your divorce becomes final during the tax year for which you are filing, the matter is simple. Unless you have remarried, you are considered unmarried for the whole year. Your status on December 31 governs the full year even if the divorce becomes final on December 31. Report half the combined community income on your return regardless of your filing status if you received any community income while you were still married.

You may qualify to file as head of household if you were unmarried on December 31 and provided more than half the cost of maintaining a home that was the principal home for longer than six months for yourself and a qualified household member. IRS Publication 504, *Tax Information for Divorced or Separated Individuals*, lists the categories of people you can include in your household for tax purposes.

A couple whose divorce will not be final until the following year faces another decision: whether to file "married filing jointly" or "married filing separately" while the divorce is pending.

FILING JOINTLY

The Internal Revenue Service offers relief from liability in certain situations. See Section 6015 of the Internal Revenue Code. The federal relief includes innocent spouse, separation of liabilities, or equitable relief. Contact the Internal Revenue Service if you want this kind of relief. *New Mexico recognizes only relief for an innocent spouse and separation of liabilities, and only when it is in writing.*

Innocent Spouse Relief

If your spouse underreported the amount of tax on your jointly filed return, you may apply to the Internal Revenue Service for relief from additional federal tax that may be due. Please refer to IRS Publication 971, *Innocent Spouse Relief (And Separation of Liability and Equitable Relief)*. (See references on page 1.) Although state law prohibits the Department from forgiving the additional state taxes due, the Department Secretary has the discretion to decline to bring collection actions against the "innocent spouse" when it is unfair to hold that spouse liable (Sec. 7-1-17.1 NMSA 1978, Regulation 3.1.12.13 NMAC).

Separation of Liabilities Relief

A spouse who filed a joint return may be relieved of a portion of the tax liability if the Internal Revenue Service determines in writing that there is a separation of liabilities because the individuals are no longer married, or they are legally separated. The IRS makes the "separation of liabilities" determination according to Section 6015(c) of the Internal Revenue Code. New Mexico honors the determination. Relief is only for part of the liability.

FILING SEPARATELY

You and your spouse may choose "married filing separately" because you cannot get along well enough to cooperate on a joint return. Perhaps you had considerable amounts of sole-and-separate property that you brought to the marriage or acquired as sole-and-separate property after the marriage.

Many couples erroneously believe they can file jointly for the state and separately for the federal government. This is not true. *You can file "married filing separately" for state tax purposes only if you choose the same status for your federal tax.* New Mexico residents who are still legally married but legally separated (or whose divorce is pending) may elect to file separately. Unless a court order directs otherwise, each must report half the combined community income, deductions and credits in addition to any separate income and deductions. Please attach the federal worksheet and your 1040 or 1040A return to your state return showing how you allocated your income and deductions. You cannot take certain federal deductions if you file separate returns. Please refer to IRS Publication 504, *Divorced or Separated Individuals*, for more information. There are special provisions for some community income:

Special Treatment of Certain Community Income

A spouse may not have to report half of certain combined community income (e.g., wages, salaries, professional fees, pay for professional services, partnership income, trade or business income and Social Security benefits) if all the following conditions exist:

1. You and your spouse lived apart all year;
2. You and your spouse did not file a joint return;
3. You and your spouse had wages, salaries, and professional fees that are community income;
4. You and your spouse did not transfer, directly or indirectly, any of the wages, salaries or professional fees between you during any part of the year.

Report half the total of all other types of community income (dividends, rents, royalties, or gains) if you meet all the above criteria.

Relief from Separate Return Liability for Community Income

A spouse who filed a married-filing-separately return may be relieved of reporting an item of community property if all the following conditions exist:

1. You did not file a joint return for the tax year;
2. You did not include an item of community income in gross income on your separate return;
3. You establish that you did not know about and had no reason to know about that community income;
4. Under all facts and circumstances it would not be fair to include the item of community income in your gross income.

Community Income Attributable to You

Under certain conditions all community income may be attributable to only one spouse. Assuming you were married during the year, you may have to report the full amount of the item of community income if you filed separately or as head of household. See Section 66 of the Internal Revenue Code at www.irs.gov. The following conditions must exist for all community income to belong to you:

1. You did not file a joint return;
2. You treated the item as if only you are entitled to the income, and
3. You did not notify your spouse of the nature and amount of the income by the due date for filing the return, including extensions of time to file.

HEAD OF HOUSEHOLD

You may be eligible to file as head of household if you were unmarried on December 31 and provided more than half the cost of maintaining a principal home for longer than six months for yourself and a qualifying household member. IRS Publication 504, *Divorced or Separated Individuals*, lists the categories of persons you may include in your household for tax purposes. Tax rates for heads of household are lower than for single or married-filing-separately taxpayers.

You may file as head of household for state tax purposes only if you file as head of household for federal purposes. Those married during any part of the year report half the combined community income, deductions and credits in addition to any separate income and deductions.

CHANGING YOUR FILING STATUS

Very specific rules apply to whether you can change your filing status by amending your return. Please refer to IRS Publication 504, *Divorced or Separated Individuals* for more information. New Mexico law does not permit you to change your filing status by an amended state return unless you attach your amended federal return.

Rules and regulations too complicated to list in a general publication on filing status and community property may require you to consult an attorney or accountant well acquainted with community property law. Please also review IRS Publication 504, *Divorced or Separated Individuals*.

ENDING THE MARITAL COMMUNITY

With respect to income, New Mexico (and the federal government, since it defers to state law in this matter) requires community property to retain its character until the date of a decree or court order ending the marital community. When the court order is final, all income from what was once community property becomes separate income. Although a court order may be entered long before the divorce is final, it can dissolve the community and the community character of income from property. See Sections 40-4-3 and 40-3-8, NMSA 1978.

You and your spouse report half the combined gain from the sale of community property. Your court order, decree or judgment may specify whether you or your spouse reports the entire gain. When you make a community property allocation on your federal return, submit copies of federal form 1040 or 1040A to the state accompanied by any federal schedules reflecting the division. See IRS Publication 504, *Divorced or Separated Individuals*. (See the references on page 1.) Include all affected Social Security numbers. Continue to allocate community income on a 50-50 basis until the court order is filed. Once it is filed, the terms of the court order are binding. *Each spouse is taxed on half the community income for the part of the year before the community ends.*

When you file separately, list the community property allocation plus whatever income you have from separate sources, provided that there has been no mixing of funds from separate property.

Funds from separate property must be easily traced as separate funds.

Each spouse should maintain separate savings and checking accounts immediately and start keeping separate books as soon as possible.

Whatever filing status you choose, plan ahead. Provide each other with copies of prior-year tax returns, wage and withholding statements and other records necessary to prepare current income tax returns. If you and your spouse are not on speaking terms, do this through your attorneys or a responsible third party.

When property cannot be identified as separate, the law presumes it is community property. According to community property law in New Mexico, each spouse owns an undivided equal interest in all community property. All community property belongs as much to one of you as to the other. After the community property allocation, however, each of you owns 100% of the property awarded to you rather than 50% of all property. This is important. If you file separately while you are still legally married, report half of all combined community income on your own return. Your spouse reports the other half on his or her return. You also must identify and report separate income, expenses, deductions, exemptions and credits. As stated, once a court order is entered, the terms of the order may pre-empt a 50-50 allocation.

For information on ending the marital community, see IRS Publication 555, *Community Property*, and IRS Publication 504, *Divorced or Separated Individuals*.

EXEMPTIONS, DEDUCTIONS AND CREDITS

Determinations of exemptions you may take and dependents you may claim occur under federal rules on your federal form 1040 or 1040A. You must do the same for state tax purposes. If you are still legally married, a full exemption is allowed for each spouse. Note, however, that a spouse is never a dependent no matter how little income the spouse may earn. Each person filing a separate or head-of-household return may claim a personal exemption. On married-filing-separately returns you may each claim an exemption. Take an exemption for your spouse only if your spouse had no gross income and was not a dependent of another taxpayer. *The question of dependents is another matter. It is important to specify dependency status as a part of the divorce settlement before the divorce becomes final.* Again, for information about allocation of federal deductions and credits, please consult IRS Publication 555, *Community Property*.

DEPENDENT CHILDREN

You may take an exemption for each dependent who meets the five-part test of dependency in Section 152 of the Internal Revenue Code. This is set out in IRS Publication 504, *Divorced or Separated Individuals*. Usually the parent with physical custody of the dependent child for the larger portion of the calendar year claims the federal and state exemptions for the child, but only if one or both of you together supply more than half the child's support, *and* the child was in the custody of either parent for more than half the calendar year. This means, for example, that neither can claim the exemption for the child if the child lives with a grandparent who provides more than half the child's support. When a divorce or separation occurs during a tax year, the parent having custody of the child for the greater portion of the remainder of the tax year usually claims the exemption.

There are times when the non-custodial parent may claim the exemption, especially when the

custodial parent cannot clearly establish that he or she provided the greater amount of support.

Joint Custody

The question of joint custody may need an accountant's or an attorney's advice on dependency status and child support. Some circumstances require certain forms waiving the dependency claim on the part of one parent. This is a federal determination. Address questions about specific situations to the IRS. The web site is www.irs.gov.

STATE TAX CREDITS AND REBATES

You may take the full credits and rebates available when you file a joint return. If you elect married-filing-separately status or head-of-household status, then you may each take only one-half the total credits or rebates. Your court order may specify which party may take the available credits and rebates if you are legally separated and not filing a joint return. Please take the credits or rebates and attach the court order to your state return if the court order specifies which of you is entitled to the credits or rebates.

CHILD SUPPORT ENFORCEMENT

When child support is not paid by a parent who is required by court order to pay, the state of New Mexico Taxation and Revenue Department by law must intercept a personal income tax refund due to that parent and direct it through the Human Services Department (HSD) to the custodial parent or guardian. When court-ordered child support is not received, the person who is supposed to receive it should contact the Human Services Department for assistance. New Mexico participates in a nationwide network linking HSD to its counterparts in other states. The custodial parent should call the Human Services Department at 1(800)759-KIDS (5437) whether or not the non-paying spouse lives in New Mexico.

TAXPAYER INFORMATION

The Department offers a variety of taxpayer information. Some information is free and other information must be purchased.

General Information. FYIs and Bulletins present general information with a minimum of technical language. All FYIs and Bulletins are free and available through all local tax offices, the Tax Information and Policy Office, and on the Internet. The Taxation and Revenue Department's Internet address is:

<http://www.tax.newmexico.gov>

Regulations. The Department establishes regulations to interpret and exemplify the various tax acts it administers. The Taxation and Revenue Department regulation book is available from the New Mexico Compilation Commission on a prepaid basis. The Compilation Commission also has a compact disk of all statutes and regulations. Specific regulations are also available at the State Records Center or on its web page at www.nmcprr.state.nm.us/nmac.

Order regulation books directly from:

New Mexico Compilation Commission

<http://www.nmcompcomm.us/index.html>

Rulings. Rulings signed by the Secretary and approved by the Attorney General are written statements that apply to one or a small number of taxpayers. A taxpayer may request a ruling (at no charge) to clarify its tax liability or responsibility under specific circumstances. The request for a ruling must be in writing, include accurate taxpayer identification and the details about the taxpayer's situation, and be addressed to the Secretary of the Taxation and Revenue Department at P.O. Box 630, Santa Fe, NM 87504-0630. The taxpayer's representative, such as an accountant or attorney, may request a ruling on behalf of the taxpayer but must disclose the name of the taxpayer. While the department is not required to issue a ruling when requested to do so, every request is carefully considered.

The department will not issue a ruling to a taxpayer who is undergoing an audit, who has an outstanding assessment, or who is involved in a protest or litigation with the department over the subject matter of the request. The Secretary may modify or withdraw any previously issued ruling and is required to withdraw or modify any ruling when subsequent legislation, regulations, final court decisions or other rulings invalidate a ruling or portions of a ruling. Taxation and Revenue Department rulings are compiled and available on the department's web page free of charge at www.tax.newmexico.gov. Click on "tax library."

Public Decisions & Orders. All public decisions and orders issued by the hearing officers since July 1994 are compiled and available on the department's web page free of charge at www.tax.newmexico.gov. Click on "tax library."

FOR FURTHER ASSISTANCE

Local tax offices can provide full service and information about the department's taxes, programs, and forms as well as specific information about your filing situation.

ALBUQUERQUE (505) 841-6200

Taxation and Revenue Department
5301 Central NE
P.O. Box 8485
Albuquerque, NM 87198-8485

LAS CRUCES (575) 524-6225

Taxation and Revenue Department
2540 S. El Paseo Bldg. #2
P.O. Box 607
Las Cruces, NM 88004-0607

SANTA FE (505) 827-0951

Taxation and Revenue Department
Manuel Lujan Sr. Bldg.
1200 S. St. Francis Dr.
P.O. Box 5374
Santa Fe, NM 87502-5374

ROSWELL (575) 624-6065

Taxation and Revenue Department
400 Pennsylvania Ave., Suite 200
P.O. Box 1557
Roswell, NM 88202-1557

FARMINGTON (505) 325-5049

Taxation and Revenue Department
3501 E. Main St., Suite N
P.O. Box 479
Farmington, NM 87499-0479

Main switchboard (Santa Fe): (505) 827-0700

GENERAL FEDERAL ASSISTANCE

Three Internal Revenue Service publications are extremely helpful: Publication 504, *Tax Information for Divorced or Separated Individuals*; Publication 555, *Federal Tax Information on Community Property*, and Publication 501, *Exemptions, Standard Deduction, and Filing Information*. Contact the Internal Revenue Service with questions about completing your federal return. The toll-free number for the IRS southwestern region is 1-800-829-1040. The web site is www.irs.gov.

For help with your **New Mexico** return, contact any of the local tax offices listed above.

Your accountant or attorney, if you have one, can advise you on more difficult matters regarding sole-and-separate property and unusual child custody questions.

This publication provides general information. It does not constitute a regulation, ruling, or decision issued by the Secretary of the New Mexico Taxation and Revenue Department. The Department is legally bound only by a regulation or a ruling [7-1-60, New Mexico Statutes Annotated, 1978]. In the event of a conflict between FYI and statute, regulation, case law or policy, the information in FYIs is overridden by statutes, regulations and case law. Taxpayers and preparers are responsible for being aware of New Mexico tax laws and rules. Consult the Department directly if you have questions or concerns about information provided in this FYI.